(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 22 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary as a physical therapist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petitioner asserts that the beneficiary qualifies for Schedule A, Group I classification. The director found that, based upon a number of inconsistencies in the record, "the actual minimum requirements for the job offered do[] not qualify to be classified under Section 203(b)(2) of the Immigration and National Act, as amended."

On appeal, counsel submits a brief and additional evidence, including educational documents from an individual who is not the beneficiary in the instant petition. The credentials do not appear relevant to the beneficiary's eligibility. For the reasons discussed below, the AAO upholds the director's conclusion that the petitioner has not overcome the director's valid concerns.

I. ANALYSIS

A. The Offered Position

In pertinent part, the regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation for classification as aliens who are members of the professions holding advanced degrees or aliens of exceptional ability:

> (i) The job offer portion of the…Schedule A application…must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

As required by regulation, an uncertified ETA Form 9089, Application for Permanent Employment Certification, in duplicate accompanied the petition.[1] The ETA Form 9089 indicates that a master's degree in Physical Therapy is required for the position. As noted by the director in his request for evidence and in his denial, "the petitioner previously filed an I-140 petition for this beneficiary…[with] the same job title [] [and] the same job duties…in the same state of employment." However, "the minimum educational requirements for the position were a Bachelor's degree." Neither ETA Form 9089 listed any experience or training requirements and both listed a state physical therapist license and passage of, or eligibility to take, the National Physical Therapy Exam under specific skills or other requirements. Both ETA Forms 9089 also indicated that a foreign equivalent degree was acceptable. The first petition was filed on February 11, 2009 and the instant petition was filed on March 9, 2011. As stated by the director in his decision, "[i]t is incumbent upon

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[1] This form replaced the Form ETA 750 as of March 28, 2005. *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77386 (Dec. 27, 2004).

the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988)." Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On appeal, counsel asserts that "since the occupation at issue (Physical Therapy) is one whose minimal educational standards has been evolving, the Service should find that the case is approvable as an EB-2." Counsel further states that "[t]he Petitioner's first I-140 requirements reflected the minimum requirements at the time that the first I-140 was filed" and that "the original EB-3 case was filed prior to the current edition of the *Occupational Outlook Handbook* [(OOH)], which clarified the evolving nature of the occupation and the entry rules for the profession." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

According to the evidence submitted by counsel from , Managing Director of Credentialing Services for the there have not been any changes in the educational requirements for physical therapists since 2001.[2] Counsel fails to explain how the minimum education changed between February 11, 2009 when the first petition was filed, and March 9, 2011 when the current petition was filed, or even how the current edition of the OOH "clarified the evolving nature of the occupation and the entry rules for the profession."

Counsel further asserts on appeal that the director failed to consider "that the position's requirements have, in fact, changed. The Service noted that the Illinois law changed in December 2004. The original petition was filed in February 2009." Counsel again fails to provide any evidence that there was any change in either the minimum educational standards for physical therapists or the minimum education required by the petitioner for the position, since the filing of the original petition (. *Id.*

Based upon the lack of probative evidence in the record to support counsel's assertions that both the minimum educational requirements for the occupation and the petitioner's minimum requirements for the position have changed between the filing of the original petition and the instant petition, the petitioner has not established that the job offered now requires an individual with an advanced degree. As the petitioner failed to provide sufficient probative evidence to resolve the inconsistencies the director identified, the petition cannot be approved. *Matter of Ho,* 19 I&N Dec. at 591-92.

B. The Qualifications of the Beneficiary

As an additional issue, counsel asserts on appeal that the beneficiary's Bachelor of Science degree in Physical Therapy from in the Philippines, awarded on March 18, 2001, is equivalent to a U.S. Master's degree. Given the inconsistencies in the record, the petitioner has not established that the beneficiary has a foreign equivalent degree to a U.S. Master's degree. An

[2] is one of the two credentialing organizations for physical therapists authorized by 8 C.F.R. § 212.15(e).

application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

As previously stated, the petitioner indicated on the ETA Form 9089, Part H, that a master's degree in "Physical Therapy" or a foreign educational equivalent is required for the job. The petitioner further indicated that an alternate combination of experience and education would not be acceptable. Although the regulation at 8 C.F.R. § 204.5(k)(2) equates a U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty to a master's degree, the ETA Form 9089 did not list this combination as an acceptable alternative.

By counsel's own admission on appeal, "it would have been inappropriate to file the original Petition as an EB-2" because "[a]ny [b]achelor[']s [d]egree [] prepared applicant conceivably would not have had five years of experience in February 2009." Certainly at the time of the filing of the beneficiary in this matter did not qualify as a member of the professions holding an advanced degree based upon a foreign equivalent degree to a U.S. bachelor's degree followed by at least five years of progressive experience in the specialty. The record, however, contains no evidence that the beneficiary had 5 years of progressive experience at the time of the filing of the instant petitioner either. Furthermore, the record does not contain evidence, nor does counsel claim, that the beneficiary has pursued additional education above that of the baccalaureate degree that she received in 2001. Counsel fails to demonstrate how the beneficiary, who by counsel's own statements was not qualified for the classification in 2009, became qualified in 2011.

In the instant petition, the AAO must determine whether or not the petitioner has demonstrated that the beneficiary's foreign Bachelor of Science degree in Physical Therapy equates to a foreign equivalent degree *above that of baccalaureate.* Counsel asserts that "the Service looks to the equivalent degree in order to make the determination" and that "the titled diploma is not compelling." The AAO will evaluate all of the evidence relating to the equivalency of the beneficiary's degree.

As stated by counsel in response to the director's request for evidence, "graduates of PT baccalaureate programs earlier than 200[][2] are 'grandfathered' into the profession." The petitioner has not established how the beneficiary's "grandfathered" baccalaureate degree could rise to the level of an advanced degree, as defined above, without any further education.

The record contains additional inconsistencies regarding the beneficiary's education and the submitted credential evaluations. The beneficiary signed both Forms ETA 9089 under penalty of perjury on January 12, 2009 and February 9, 2011 respectively. On the ETA Form 9089 submitted with the beneficiary affirmed that her highest education level achieved was a bachelor's degree. In the instant petition, the beneficiary affirmed on the ETA Form 9089 that her highest education level achieved was a master's degree. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not resolved the inconsistent claims regarding the beneficiary's education on the Forms ETA 9089.

In addition to the inconsistent claims on the Forms ETA 9089, the petitioner also submitted inconsistent evaluations. On appeal, the petitioner submitted an evaluation from of the states that is recognized by the However, the beneficiary attended Furthermore, did not attach copies of the materials she relied upon to make the determination, including the she asserts supports her evaluation. The evaluation from submitted with and with the instant petition states that "[t]his degree does satisfy the minimum number of 120 semester credits that is required for a U.S. Bachelor[']s degree. The curriculum is substantially equivalent in content to the first professional physical therapy degree in the United States." The petitioner submitted a revised evaluation on appeal which states that "[t]he applicant's studies do meet the minimum of 150 semester credits that is required for a master's degree in the United States. The curriculum is substantially equivalent in content to the first professional physical therapy degree in the United States. The first professional degree in physical therapy in the United States is a master's degree or higher." fails to provide a general definition of the phrase "first professional degree" beyond simply providing an example for one field. also fails to indicate that 150 semester credits is the minimum requirement for a master's degree *in Physical Therapy* in the United States. The revised evaluation contains no changes to the beneficiary's coursework and provides no explanation for the change in the equivalency. The AAO also notes that, according to the coursework calculator portion of the submitted evaluations, the minimum required credits are listed as 123, not 150 as stated by the evaluator herself. The petitioner has not resolved the inconsistencies among the various evaluations with objective evidence as required. *See Matter of Ho,* 19 I&N Dec. at 591-92.

As previously discussed, the beneficiary graduated prior to the discontinuation of the bachelor's degree in the United States. Any implication that a grandfathered bachelor's degree in physical therapy rises to the level of a master's degree simply by the grandfathering allowance is not persuasive. The equivalency of a foreign degree does not change when educational standards subsequently change simply because the field permits prior degrees from a certain period.

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). Based upon the information in the record and the above inconsistencies, the petitioner has not established that the beneficiary holds a master's degree in Physical Therapy, a job requirement on the ETA Form 9089.

III. CONCLUSION

The petitioner has not established that the actual minimum requirements for the job offered qualify the position to be classified under Section 203(b)(2) of the Immigration and National Act. In addition, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.